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No. 78449-3

SUPREME COURT OF THE STATE OF WASHINGTON

DORIS BURNS, RUD OKESON, ARTHUR T. LANE, KENNETH GOROHOFF and WALTER L. WILLIAMS, individually and on behalf of the class of all persons similarly situated,

Appellants,

v.

THE CITY OF SEATTLE, THE CITY OF SHORELINE, THE CITY OF BURIEN, THE CITY OF LAKE FOREST PARK, THE CITY OF SEATAC and THE CITY OF TUKWILA,

Respondents.

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BY C. J. MERRITT

APPELLANTS' ANSWER TO AMICI CURIAE BRIEFS OF CITY OF TACOMA AND CITIES OF UNIVERSITY PLACE AND LAKEWOOD

David F. Jurca, WSBA #2015
Connie K. Haslam, WSBA #18053
Colette M. Kostelec, WSBA #37151
HELSELL FETTERMAN LLP
1001 Fourth Avenue, Suite 4200
P.O. Box 21846
Seattle, WA 98111
(206) 292-1144
Attorneys for Appellants

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I. <u>INTRODUCTION</u>

The amici curiae briefs of the City of Tacoma and the Cities of University Place and Lakewood add nothing of value to the legal analysis of the issues before the Court. The amici briefs amount to little more than statements of position by those three cities that they want the respondents to prevail because the amici entered into electric utility franchise agreements that are similar to the ones before the Court.

The amici briefs do not address the sole basis for the trial court's decision, namely the meritless notion that the statute prohibiting a city from "imposing" fees on electric utilities does not apply where the utility has <u>agreed</u> to pay the fees prescribed in a city ordinance.[1] Instead, the amici briefs address a different argument, which was made by the respondent cities below (and in their appeal briefs) but was not addressed by the trial court. That argument is that the fees in question are not really "franchise fees" paid for the privilege of conducting an electric utility business in the suburban cities, but rather are payments made in consideration of separate promises by the suburban cities not to form their own electric utilities. That argument is as transparent and unavailing

[1] The utter lack of merit of that notion is explained in appellants' opening and reply briefs (hereafter "App. Br." and "App. Reply Br.") at 23-28 and 1-10, respectively. The trial court's unduly narrow interpretation of the word "impose" is contrary to the dictionary definition of the term, contrary to common usage, and contrary to the legislative intent and purpose underlying the statute, and would render the statute essentially meaningless.

coming from the amici cities as it is coming from the respondent cities. The only difference is that appellants have not had occasion to obtain discovery from the amici cities to uncover the facts demonstrating the factual hollowness of that argument concerning those cities, as the appellants have done in spades with respect to the respondent cities.

II. ARGUMENT

A. The History of the Negotiations Shows that the Fees Were Intended as a Means of "Sharing" the Utility Tax on City Light's Sales to Suburban Customers, Not as Consideration for the Suburban Cities' Promise Not to Form Their Own Utilities.

No honest reading of the history of the franchise negotiations between Seattle and the five suburban cities could support a conclusion that the payments in question were ever intended to be anything other than a means of "sharing" Seattle's utility tax revenues from sales of electricity to suburban customers. From the beginning of those negotiations through their conclusion, the primary concern of the suburban cities was to receive a share of the utility tax paid by City Light to Seattle's general fund on the utility's sales to suburban customers. *See* App. Br. at 9-16. In sum, this sharing of the utility tax revenues was a concession actively sought by the suburban cities as a condition for allowing City Light to continue providing utility service to customers residing in the suburban cities.

Over the spring and summer of 1998 the respondent cities agreed that Seattle would in effect "split 50-50" the utility tax on sales to suburban customers.[2] At a meeting on August 14, 1998, Seattle and the suburban cities "completed successful discussions" on sharing Seattle's 6% municipal tax on sales to suburban customers, by having City Light pay to the suburban cities 6% of the "power" half of revenues from sales to suburban customers. *See* App. Br. at 14-15; CP 641. This was the arrangement that had been proposed, negotiated and agreed to by the contracting parties over the preceding several months. *See* App. Br. at 10-14. It was not until the "completion" of those discussions at the meeting on August 14, 1998 that anyone suggested following the Tacoma example and "calling" the payments consideration for a promise by the suburban cities not to form their own utilities:

> I suggested we use a format similar to what Tacoma City Light has agreed to with the Cities of Lakewood and University Place. In their agreements, the Cities of Lakewood and University Place have agreed not to exercise their option of forming a municipal electric utility. In return, Tacoma City Light has agreed to make a payment to

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[2] Seattle agreed that City Light would pay to the suburban cities 6% of the revenues from the "power" portion of sales to residents of the suburban cities. Since the "power" portion of the sales amounted to about 50% of the total revenues (the other 50% was the "distribution" portion), the result was that the suburban cities would be paid about half of Seattle's 6% utility tax on revenues from sales to suburban customers. *See* App. Br. at 11-16. In actuality, however, Seattle's general fund retained the full 6% utility tax, and City Light ended up paying to the suburban cities an <u>additional</u> amount, equal to about 3% (half of 6%) of the utility tax on suburban sales. Thus, despite the statutory 6% limit on a municipal tax on an electric utility (*see* RCW 35.21.870(1)), City Light ratepayers have in effect been saddled with what amounts to an illegal <u>9%</u> "tax" on suburban sales, 6% going to Seattle's general fund as utility tax and 3% going to the suburban cities as illegal franchise fees.

> those cities. It is their belief that this is a contract between two parties–one party, the Cities of Lakewood and University Place, are returning to the other party something of value–and, in this case, Tacoma City Light is providing remuneration to those cities in recognition of that. <u>They believe that by not calling it a franchise fee, or a utility tax rebate, it satisfies the conditions in current state law and does not require any change in state law to facilitate</u>.

CP 641 (memorandum from Lake Forest Park's city administrator to its mayor) (emphasis added); *see* App. Br. at 14-15.

Thus, the idea of "calling" the payments consideration for the suburban cities' promise not to form their own electric utilities was not even raised until <u>after</u> the respondent cities had already agreed to the 50-50 split of the municipal utility tax on sales to suburban customers. Moreover, the idea was raised solely as a way to get around the two legal prohibitions blocking the transfer of such funds from City Light to the suburban cities: (1) absent express legislative authorization, one municipality may not impose a tax on another municipality or on its proprietary utility (*see* App. Br. at 8-9 & n.13), and (2) under RCW 35.21.860(1) a city may not impose a franchise fee or "any other fee or charge of whatever nature or description" on an electric utility business, subject to various exceptions not applicable here.[3]

[3] The respondent cities were well aware of these dual prohibitions. *See, e.g.,* CP 581 ("The tax rate limitation for electricity and case law barring one municipality from taxing another effectively prohibit these newly incorporated areas from assessing utility taxes on sales by Seattle-operated utilities in their jurisdiction"); CP 582 ("C1. Franchise fee --

It could hardly be clearer that Seattle agreed to have City Light make the payments in question as a compromise to satisfy the suburban cities' demand that utility taxes on sales to residents of the suburban cities should go to those cities rather than to Seattle's general fund. The idea of "calling" the payments consideration for the suburban cities' promise not to form their own utilities was an after-thought, suggested as a supposed way to get around the two legal prohibitions described above, and was first raised at the end of the negotiations after the parties had already agreed to compromise by splitting the taxes 50-50. Obviously City Light agreed to make the payments in question so that it could continue to provide electric utility service to the suburban cities; the purpose for the payments was not to "compensate" the suburban cities for promising not to form their own utilities.

Tacoma claims at pages 13-15 of its amicus brief that extrinsic evidence concerning the history of the parties' negotiations cannot be considered because the contracting parties themselves state that the purpose of the payments was to compensate the suburban cities for their

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appears to be an option for Water but is prohibited for electrical unless there is a Legislative fix"); CP 588 ("there is no apparent statutory mechanism that would allow us to transfer any part of this tax revenue to the City of Shoreline. Current State law limits the franchise fee on another city to the costs of administration"); *see generally* App. Br. at 9-16, citing numerous references in respondent cities' internal documents describing the need for a "legislative fix" to allow the payments in question. No such "legislative fix" has been made.

promises not to form their own utilities. That argument misses the mark and is legally unsupportable.[4] It is well established that neither the parol evidence rule, the context rule, nor any other legal principle bars a court from looking behind the contracting parties' words when the dispute is not between the contracting parties, but rather is a dispute with third parties as to whether the contract is illegal:

> The parol evidence rule applies only to controversies between the parties to the instrument or those claiming under them. <u>It does not apply to a controversy between a party to the instrument and a third person</u>. In the latter situation, the rule bars neither the party nor the nonparty to the instrument from introducing parol evidence at variance with the writing.

5C Karl B. Tegland, *Washington Practice, Evidence Law and Practice* § 1200.5 (4th ed. 1999) (emphasis added); *Witenberg v. Sylvia*, 35 Wn.2d 626, 629-30, 214 P.2d 690 (1950) (in action against maker of check, admission of holder's testimony as to actual nature of transaction between him and payee did not violate parol evidence rule, despite existence of written agreements, where maker was stranger to written agreements); *State ex rel. Wirt v. Superior Court for Spokane County*, 10 Wn.2d 362, 368, 116 P.2d 752 (1941) (it is well settled that rule against parol contradiction of written contract cannot by invoked against strangers to contract); *In re Matter of Prior Bros. Inc.*, 29 Wn. App. 905, 910, 632

[4] The suburban cities made the same erroneous argument in their appeal brief at 22-24.

P.2d 522 (1981) (general rule is third parties are not bound by parol evidence rule against parties to writing).

Here, the ratepayers who are being harmed by the illegal agreements between City Light and the suburban cities are not parties to those agreements. Accordingly, they are not barred from showing that the contracting parties agreed to ascribe a fictitious rationale for the payments in question in a transparent attempt to get around the legal prohibitions on those payments.

B. The Structure and Purpose of the Franchise Agreements Show that the Payments Are for the Privilege of Conducting an Electric Utility Business in the Suburban Cities, Not for a Separate Promise by the Cities Not to Form Their Own Utilities.

In assessing the legality of the payments required by the franchise agreements, the Court should look primarily to the substance of the transactions, *i.e.*, the structure and purpose of the agreements and how they work. *See* App. Br. at 36-42; App. Reply Br. at 13-14. Here, the entire purpose of the franchise agreements is to set forth the terms under which City Light is allowed to provide electric utility service to customers in the suburban cities, *i.e.*, to set forth the terms of the franchises that were granted by the cities to City Light and were then accepted by City Light.

The respondent cities' and amici cities' suggestion that City Light's required payments under the franchise agreements are not actually for the franchises but rather are for a supposedly "separate" and "independent" promise by the suburban cities not to form their own electric utilities is, quite frankly, absurd. That promise by the suburban cities is neither separate nor independent. That promise would be of no value to City Light if the utility did not have a franchise to provide service to those cities. And that promise is directly related to the subject and purpose of the franchise and is part of the very fabric of the franchise relationship between the parties.

The mere fact that the promise by each of the suburban cities not to form its own electric utility was not a "necessary" ingredient of the franchise does not mean that such a promise was separate and independent from the franchise. The same could be said of the franchise provisions regarding rate parity (§4.1.3), undergrounding (§7), streetlighting (§8), or any number of other "unnecessary" provisions that nevertheless were included as part of the overall fabric of the franchise agreements. *See* App. Br., Appendix C (copy of franchise agreement). The payments in question, which are required by §4.1.1 of the franchise agreements, are part of the overall consideration for the franchises themselves, and are not payments for some separate or independent promise by the suburban cities.

C. Section 4.2 of the Franchise Agreements Shows that the Payments in Question Were for the Franchises, Not for a Supposed "Separate" Promise by the Suburban Cities Not to Form Their Own Utilities.

Perhaps the clearest demonstration of the fallacy of amici's (and respondents') argument that the payments in question were for the suburban cities' promise not to form their own utilities, rather than for the franchises, is provided by §4.2 of the franchise agreements:

> Should the City of Seattle be prevented by judicial or legislative action from collecting a utility tax on all or a part of the revenues derived by SCL from customers in the [suburban city], SCL shall reduce the payments to the [suburban city] provided in Section 4.1.1 above by an equivalent amount.

See App. Br., Appendix C at 3. Under that provision, if City Light's tax payments to Seattle's general fund arising from sales to suburban customers are reduced by judicial or legislative action, then City Light's payments to the suburban cities are to be reduced by an equivalent amount. That arrangement is perfectly logical if the rationale for the payments is that Seattle and the suburban cities are in effect sharing the utility taxes payable by City Light to Seattle's general fund on sales to suburban customers. But that arrangement would make no sense if the rationale for the payments were that the payments were in consideration for the suburban cities' promise not to form their own utilities. That is because the value to City Light of a promise by a suburban city not to form its own utility would not be diminished at all by a legislative or judicial development reducing the amount of utility tax payable by City Light to Seattle's general fund on suburban sales. If anything, such a legislative or judicial development would <u>increase</u> the value to City Light of the suburban city's promise not to form its own utility, because it would mean that City Light could keep more of its revenues from suburban sales. If the payments under §4.1.1 of the franchise agreements were really intended as consideration for the suburban cities' promise not to form their own utilities, there would be no reason on earth why a reduction in the amount of utility tax payable by City Light to Seattle's general fund should lead to a reduction in the amount of the payments by City Light to the suburban cities.

Appellants made this point in their opening brief at 41-42 and in their reply brief at 14-15, but neither the respondent cities nor the amici cities have made any attempt to respond to this point – because they have no defense to it.

D. <u>The Payments in Question Are Prohibited Regardless of the Respondent Cities' Professed Rationale for Them, Because the Statute Prohibits Not Merely Franchise Fees but "any other fee or charge of whatever nature or description"</u>.

The whole point of amici's (and respondents') argument that the payments are not really "franchise fees" but payments in consideration for the suburban cities' promise not to form their own utilities, is to attempt to persuade the Court that the payments are not prohibited by RCW 35.21.860 because they are not franchise fees. But amici's and respondents' argument does not lead to the conclusion they wish, because the statute expressly prohibits not merely "franchise fees" but also "any other fee or charge of whatever nature or description" on an electric utility business, subject to various exceptions not applicable here. Thus, regardless of the true rationale for the payments, they are prohibited by the statute because they do not fall within any of the statutory exceptions.

Amici and respondents also misread the statute in assuming it applies only to payments that are "for use of the right of way." That phrase was not part of the statute as originally enacted in 1982 and applies only to "service providers" (a defined term meaning telecommunication and cable television companies, not electric utilities like City Light). As originally enacted in 1982, RCW 35.21.860 prohibited cities from imposing a "franchise fee or any other fee or charge of whatever nature or description upon the light and power, telephone or gas distribution businesses, as defined in RCW 82.16.010," with three exceptions not applicable here. The phrase "or service provider for use of the right of way" applies only to "service providers" and was added in 2000 by new legislation dealing comprehensively with the use of municipal rights-of-way by "service providers," defined in §1(6) of the 2000 legislation as telecommunications and cable television companies. City Light is <u>not</u> a "service provider" within the meaning of that legislation.[5] Thus, under RCW 35.21.860 a city may not impose "a franchise fee or any other fee or charge of whatever nature or description" on an electric utility business, regardless of whether the fee or charge is "for use of the right of way."[6]

III. <u>CONCLUSION</u>

The amici cities make no legal arguments that were not already made by the respondent cities. Their principal argument is that the payments in question were not for the franchises but for the suburban cities' promises not to form their own utilities. That argument is not only factually and legally wrong but is also irrelevant, since the statute expressly prohibits a city from imposing on an electric utility business not only franchise fees but "any other fee or charge of whatever nature or description," and regardless of whether the fee is "for use of the right of way" or for any other purpose.

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[5] The history of the original 1982 legislation and the 2000 amendments dealing with telecommunications and cable television "service providers" is described in greater detail in App. Br. at 5-8.

[6] The Court should carefully note the grammatical structure of the statute. The absence of a comma in the phrase "or service provider for use of the right of way," added as part of the 2000 legislation dealing with telecommunications and cable television companies defined as "service providers," implies that the qualifier "for use of the right of way" applies to "service provider(s)" but not to the kinds of utilities mentioned earlier in the statute and addressed in the original 1982 legislation.

Respectfully submitted this 30th day of October, 2006.

HELSELL FETTERMAN LLP

By ______________________

David F. Jurca, WSBA #2015
Connie K. Haslam, WSBA #18053
Colette M. Kostelec, WSBA #37151
Attorneys for Appellants